PRIVY COUNCIL REPORT

GOVERNMENT OF MALAYSIA & ANOR. v. SELANGOR PILOT ASSOCIATION

[P.C. (Viscount Dilhorne, Lord Wheatley, Lord Salmon, Lord Fraser of Tullybelton and Lord Russell of Killowen) January 11, 1977]

[Privy Council Appeal No. 45 of 1975]

Constitutional Law — Property — Deprivation of — Act of Parliament prohibiting persons who are not port authority pilots from acting as pilots in pilotage district — Whether Act ultra vires the Constitution — Whether there is compulsory acquisition of property — No provision for compensation — Whether goodwill property — Federal Constitution, arts. 13 and 74.

This was an appeal from the decision of the Federal Court ([1975] 2 M.L.J. 66). The respondents had been carrying on the business of providing pilotage services within certain areas of the Port of Klang and they had in fact a monopoly of that business. The Port Authorities Act 1963 was amended by the Ports Authorities (Amendment) Act, 1972 which added two new sections, the effect of which was to prohibit the respondents from carrying on their business within the pilotage districts. The second appellant, Lembaga Pelabohan Kelang took over the physical assets of the respondents and paid compensation for them. The respondents asked for compensation for loss of goodwill and loss of future profits but this was refused. They applied for a declaration that they were entitled to compensation for the goodwill of their business. Alternatively they claimed a declaration that section 35A (added by the Port Authorities (Amendment) Act) was unconstitutional as it was inconsistent with article 13 of the Federal Constitution. The High Court (per Abdul Hamid J.) dismissed the Association's claim and held that there were no grounds for saying that section 35A was unconstitutional and that there had been no acquisition of property within the meaning of article 13: [1974] 2 M.L.J. 123. The Association appealed and the Federal Court allowed the appeal ([1975] 2 M.L.J. 66) and held *inter alia* — (1) a person may be deprived of his property or his property may be acquired by or on behalf of the State by a mere negative or restrictive provision interfering with his enjoyment of the property, even if there had been no transfer of the ownership or right of possession of the property to the State or to a corporation owned or controlled by the State; (2) in this case as the impugned section 35A had the effect of depriving the appellants of their property and as it did not provide for adequate compensation, it contravened article 13 of the Federal Constitution; (3) there should therefor be a declaration that the plaintiffs are entitled to compensation for the goodwill of their business of which they have been deprived.

Held, allowing the appeal (Lord Salmon dissenting): (1) the restrictions placed on the activities of individual licensed pilots did not deprive them of property nor did it deprive the licensed pilots who were partners in the Association of property. All they lost was the right to act as pilots unless employed by the Authority and the right to employ others on pilotage, neither right being property;

(2) article 13 of the Constitution of Malaysia cannot properly be construed in the way in which article 31 of the Constitution of India has been construed. Although a person may be deprived of property by a mere negative or restrictive provision, it does not follow that every provision which leads to deprivation also amounts to compulsory acquisition or use;

(3) if, in consequence of the amending legislation, the Association was deprived of property there was no breach of article 13(1) for such deprivation was in accordance with the law which it was within the competence of the legislature to pass;

(4) there was no contravention of article 13(2) as there was no compulsory acquisition or use of property contrary to article 13(2). Even if the Association's right to employ licensed pilots which was destroyed by the amending Act was a right of property, this right was not acquired or used by the Port Authority. Its right to employ them was given to it and acquired by it from the Legislature;

(5) even if the Association, over a period of time, had acquired a goodwill (of which it was deprived by the amending Act) it does not follow that the goodwill was acquired by the Port Authority from the Association.

Per Lord Salmon, dissenting: "The legislative measure passed in 1972 obviously had an inevitable effect of putting the respondents out of business.... I am, however, entirely convinced that the amending Act of 1972 did provide indirectly but inevitably for the compulsory acquisition without compensation of the respondents' property by the Authority and therefore contravened article 13(2) of the Constitution."

Cases referred to:-

(1) *State of West Bengal* v. *Bose* [1954] S.C.R. 587.
(2) *Chiranjit Lal's case* [1950] S.C.R. 869, 924.
(3) *Dwarkadas Shrinivas of Bombay* v. *The Sholapur Spinning and Weaving Co. Ltd.* [1954] S.C.R. 674.
(4) *Saghir Ahmad* v. *The State of U.P. & Ors.* [1955] S.C.R. 707.
(5) *Ulster Transport Authority* v. *James Brown & Sons Ltd.* [1953] N.I. 79.
(6) *Northern Ireland Road Transport Board* v. *Benson* [1940] N.I. 133.
(7) *France Fenwick & Co. Ltd.* v. *The King* [1927] 1 K.B. 458.
(8) *Pillai v. Mudanayake* [1953] A.C. 514.
(9) *Belfast Corporation* v. *O.D. Cars Ltd.* [1960] A.C. 490, 519.

PRIVY COUNCIL APPEAL FROM MALAYSIA.

Robert Alexander Q.C. and *Nicholas Lyell* for the appellants.

Denis Henry and *S. Sothi* for the respondents.

Viscount Dilhorne (delivering majority judgment of the Board): Under the Merchant Shipping Ordinance, 1952, the Pilot Board of Port Swettenham were in control and had supervision of all pilots on their register. They were given power to grant, to withdraw and to endorse pilotage licences (section 410). The Pilot Board fixed the number of pilots to whom licences might be granted and that number having been fixed, no new licence could be granted so long as the number of pilots so fixed were present at or near the port in the execution of their duties (section 411). Licences were granted after examinations and sight tests had been passed (sections 417, 418); they might be either permanent or temporary (section 420) but licence holders might be required once a year and had once in every five years to submit to sight tests and, if owing to changed conditions or for any other reason the Pilot Board considered it necessary, to pass a further examination (section 419). The pilotage dues were prescribed by the High Commissioner and were charged by the pilots for their services (section 428).

The Port Authorities Act, 1963, was passed to provide for the establishment of Port Authorities. Section 2(1) enacted that there should be established in respect of every port specified in the First Schedule a Port Authority. The only port specified in that Schedule was Port Swettenham, but the Act was clearly designed to apply to a number of ports.

Section 3 stated that the function of the Port Authority was to operate and maintain the port and gave it the powers necessary for that purpose. One of the duties imposed on the authority was:

"to maintain, or provide for the maintenance of, adequate and efficient port services and facilities (including ferry services) at reasonable charges for all users of the port, consistent with the best public interest."

The Act did not specifically refer to pilotage services.

On September 12, 1969 six licensed pilots entered into a partnership agreement to carry on the business of pilotage under the name of "The Selangor Pilot Association (1946)." Clause 8 of this agreement provided that:

"The proceeds of all Pilots' dues shall be pooled together with all other moneys received on account of the partnership."

The only income received by the Association consisted of pilotage dues earned by the licensed pilots who were partners and by the licensed pilots who were employed by the Association.

The Port Authorities Act, 1963, was amended by the Port Authorities (Amendment) Act, 1972. It added to the duties imposed by that Act on a Port Authority, the duty of providing pilotage services within the limits of the port and the approaches to the port. This Act also amended the 1963 Act so as to give Port Authorities power to prescribe pilotage dues and provided for the insertion in that Act of a number of new sections dealing with pilotage and pilots. Those relevant to this case are the following:

"Section 29A (1) The authority may from time to time by notification in the *Gazette* declare any area in the port or the approaches to the port to be a pilotage district.

....

Section 29D The authority with the approval of the Minister shall appoint a Pilotage Committee for the purpose of —

(a) holding examinations and issuing, on behalf of the authority, licences to act as an authority pilot.

....

Section 29H(1) The Pilotage Committee shall examine candidates for employment by the authority as pilots and on being satisfied as to a candidate's general fitness and competency, including physical fitness, to act as an authority pilot, may, on behalf of the authority, issue to him a licence to act as such, and such licence may contain such conditions as the Pilotage Committee may deem fit.

(2) Subject to the provisions of this Part, every pilot holding immediately prior to the coming into operation of the said Part, a licence issued under the Merchant Shipping Ordinance, 1952 to act as a pilot in the Port Swettenham pilotage district, shall be deemed to be qualified for employment by the authority as a pilot, and the Pilotage Committee shall, on behalf of the authority, issue to such pilot when employed by the authority a licence to act as an authority pilot in the pilotage district, subject to such conditions as the Pilotage Committee may impose.

(3) Every authority pilot shall whenever the Pilotage Committee considers that, owing to changed conditions or for any other sufficient reason, the further testing of the knowledge, efficiency or physical fitness of any such pilot is necessary, present himself for further examination, ...

(4) The authority shall not continue to employ as a pilot any pilot whose licence to act as such is cancelled as a result of any test or examination carried out or held under the provisions of subsection (3) of this section.

(5) Any licence issued under the provisions of this section shall cease to be valid upon the termination of any authority pilot's employment with the authority.

....

Section 35A (1) Any person who, not being an authority pilot, engages in any pilotage act or attempts to obtain employment as a pilot of a vessel entering or being within any pilotage district shall be guilty of an offence under this Act and shall be liable on conviction to a fine not exceeding one thousand dollars.

(2) Any master or owner of a ship entering or being within any pilotage district who knowingly employs as pilot any person who is not an authority pilot shall be guilty of an offence under this Act and shall be liable on conviction to a fine not exceeding one thousand dollars."

On April 13, 1972 Port Swettenham was declared to be a pilotage district pursuant to section 29A and on May 1, 1972 the Port Authority began to operate the pilotage services in that port. Prior to that the Authority had offered to employ every pilot licensed under the Merchant Shipping Ordinance. All except a small number accepted this offer.

The Selangor Pilot Association rented premises from the Port Authority and had a number of physical assets which they voluntarily sold to the Authority.

On December 9, 1972 a Writ was issued on behalf of the Association against the Government of Malaysia and the Port Authority claiming

"1. A declaration that the plaintiffs are entitled to compensation for the goodwill of which they have been deprived of their business known as 'Selangor Pilot Association (1946)' which has been compulsorily acquired by the First Defendant [The Government of Malaysia] on behalf of the second defendant [The Port Authority] by virtue of the provisions of sections 5 and 6 of the Port Authorities (Amendment) Act, 1972 whereby new sections 29A and 35A were added to the Port Authorities Act, 1963.

2. Alternatively for a declaration that the provisions of the said section 35A of the Port Authorities Act, 1963 are unconstitutional and of no effect."

A claim for damages was added in the prayer of the Statement of Claim for the loss of profits caused by the Association having to cease business as from May 1, 1972.

In paragraph 7 of the Statement of Claim the plaintiffs claimed compensation for the loss of goodwill of their business and for loss of future profits. In paragraph 8 they asserted that section 35A was unconstitutional and of no effect by virtue of Article 13 of the Constitution of Malaysia and claimed damages. Both claims presumably were against both the Government of Malaysia and the Port Authority.

Article 13 of the Constitution which is headed "Rights to Property" reads as follows:

"(1) No person shall be deprived of property save in accordance with law.

(2) No law shall provide for the compulsory acquisition or use of property without adequate compensation."

Abdul Hamid J. dismissed the Association's claim, holding that there were no grounds for saying that section 35A was unconstitutional and of no effect and that there had been no acquisition of property within the meaning of Article 13. The Federal Court, however, for reasons which will be considered later, reversed his decision and granted the declaration sought in the first prayer.

Before the passage of the Port Authorities (Amendment) Act, 1972, licensed pilots were free to act on their own if they wished. None did so. They were either partners in or employed by the Association which consequently enjoyed a monopoly in the provision of pilotage services in Port Swettenham. Every vessel requiring a pilot had to secure one through the Association. After its passage licensed pilots could only lawfully provide pilotage if employed by the Port Authority. This amending Act prohibited, unless they were so employed, the exercise by them of functions which the grant of licences to them entitled them to perform.

The first question for consideration is whether this restriction on the exercise of a pilot's rights given by the grant of a licence amounted to a deprivation of property. An ordinary driving licence in the United Kingdom entitles its holder to drive many classes of vehicles, including heavy locomotives. If Parliament in its wisdom thought it advisable that in future drivers of heavy locomotives should have a special test and that unless the holders of driving licences had passed that test, they should not drive heavy locomotives, could it be said that all holders of driving licences were in consequence deprived of property? Does disqualification from holding a driving licence involve deprivation of property?

In the opinion of their Lordships, the answer to these questions is in the negative. In their view the restriction placed on the activities of individual licensed pilots did not deprive them of property and if this be the case, it is hard to see that it can be said to have deprived the licensed pilots who were partners in the Association of property. All they lost was the right to act as pilots unless employed by the Authority and the right to employ others on pilotage, neither being property.

The result was that the Association could no longer carry on its business and employ licensed pilots but unless it was deprived of property otherwise than in accordance with law or its property was compulsorily acquired or used by the Port Authority, there was no breach of Article 13.

In the opinion of the Federal Court section 35A did not comply with Article 13. That Court based its conclusion on decisions of the Supreme Court of India on comparable provisions of the Constitution of India, Article 31 of which, so far as material, read as follows:—

"(1) No person shall be deprived of his property save by authority of law.

(2) No property, moveable or immoveable, including any interest in, or in any company owning, any commercial or industrial undertaking, shall be taken possession of or acquired for public purposes under any law authorising the taking of such possession or such acquisition, unless the law provides for compensation for the property taken possession of or acquired and either fixes the amount of the compensation, or specifies the principles on which, and the manner in which, the compensation is to be determined and given."

Though Article 31 of the Indian Constitution, as it was before 1955, was expressed at greater length than Article 13 of the Constitution of Malaysia, their effect appears to be substantially the same.

In the *State of West Bengal* v. *Bose*[1] the majority of the Supreme Court held that Article 31(1) and (2) were not mutually exclusive but must be read together. Patanjali Sastri C.J. at page 607 expressed the opinion that Article 31 was designed to protect the right of property,

"by defining the limitations on the power of the State to take away private property without the consent of the owner. It is an important limitation on that power that legislative action is a pre-requisite for its exercise."

Though it may be said that Article 31(1) is of wider application than that and protects a person from being deprived of his property by anyone save by authority of law, their Lordships see no reason to question the accuracy of this statement. The Chief Justice, with whose judgment Mahajan and Ghulam Hasan JJ. concurred, went on to say at page 608 that the deprivation contemplated in Article 31(1) was "no other than the acquisition or taking possession of property referred to in" Article 31(2).

Das J., while agreeing that the appeal should be allowed, did so for a different reason. He adhered to the opinion he had expressed in *Chiranjit Lal's* case[2] that

"Article 31(1) formulates the fundamental right in a negative form prohibiting the deprivation of property except by authority of law. It implies that a person may be deprived of his property by authority of law. Article 31(2) prohibits the acquisition or taking possession of property for a public purpose under any law, unless such law provides for payment of compensation. It is suggested that clauses (1) and (2) of Article 31 deal with the same topic, namely, compulsory acquisition or taking possession of property, clause (2) being only an elaboration of clause (1). There appear to me to be two objections to this suggestion. If that were the correct view, then clause (1) must be held to be wholly redundant and clause (2), by itself, would have been sufficient. In the next place, such a view would exclude deprivation of property otherwise than by acquisition or taking of possession."

The view of the majority in that case as to the meaning of Article 31 was followed by the Supreme Court of India in *Dwarkadas Shrinivas of Bombay* v. *The Sholapur Spinning and Weaving Co. Ltd.*[3] and in *Saghir Ahmad* v. *The State of U.P. & Ors.*[4] where it was said by Mukherjea J. at page 729

"the deprivation contemplated in Article 31 clause 1 being no other than acquisition or taking possession of the property referred to in clause 2."

In this case, in the Federal Court of Malaysia Suffian L.P., with whose judgment Ali Hassan F.J. concurred, thought, that a construction similar to that given by the Supreme Court of India to Article 31 of the Indian Constitution should be given to Article 13 of the Constitution of Malaysia. In his view

"a person may be deprived of his property or his property may be acquired by on on behalf of the State by a mere negative or restrictive provision interfering with his enjoyment of the property even if there has been no transfer of the ownership or right to possession of that property to the State or to a corporation owned or controlled by the State."

Lee Hun Hoe C.J. Borneo expressed a similar opinion.

Their Lordships have carefully considered the views expressed in these Indian cases to which reference has been made and the judgments of the Federal Court in this case and have come to the conclusion that Article 13 of the Constitution of Malaysia cannot properly be construed in the way in which Article 31 of the Constitution of India has been construed. Deprivation may take many forms. A person may be deprived of his property by another acquiring it or using it but those are not the only ways by which he can be deprived. As a matter of drafting, it would be wrong to use the word "deprived" in Article 13(1) if it meant and only meant acquisition or use when those words are used in Article 13(2). Great care is usually taken in the drafting of Constitutions.

Their Lordships agree that a person may be deprived of his property by a mere negative or restrictive provision but it does not follow that such a provision which leads to deprivation, also leads to compulsory acquisition or use.

If in the present case the Association was in con-

sequence of the amending Act deprived of property, there was no breach of Article 13(1) for that deprivation was in accordance with a law which it was within the competence of the Legislature to pass.

In relation to Article 13(2) the question to be answered is: Was any property of the Association compulsorily acquired or used by the Port Authority? Only if there was, could there have been a failure to comply with Article 13(2). The only property, launches, etc., acquired by the Port Authority from the Association was acquired by voluntary agreement. Even if the right of the Association to employ licensed pilots which was destroyed by the amending Act can be regarded as a right of property, in the view of the majority of their Lordships the Association's right to employ pilots was not acquired or used by the Port Authority. Its right to employ them was given to it and acquired by it from the Legislature.

It may be that the Association by its enjoyment over a considerable period of time of a monopoly in the provision of pilotage services had acquired a goodwill, the value of which would be reflected on a sale by it of its business and of which it was deprived by the amending Act. But if that were so, it does not follow that the goodwill was acquired by the Port Authority from the Association and in the opinion of the majority of their Lordships it was not.

Reliance was placed by the Federal Court on the decision in *Ulster Transport Authority* v. *James Brown & Sons Ltd.*[5] in the Northern Ireland Court of Appeal. Section 5(1) of the Government of Ireland Act 1920 prohibited the Parliament of Northern Ireland from making laws:

"so as either directly or indirectly to . . . take any property without compensation."

The Road and Railway Transport Act (Northern Ireland), 1935, had as its main object the transfer of various road transport undertakings to a public authority called the Northern Ireland Road Transport Board. Section 5 of that Act provided for the acquisition of undertakings and section 6 for the payment of compensation. Section 15(1) prohibited a person other than the Board from using a motor vehicle on the public highway for hire or reward except with the consent in writing of the Board and the approval of the Ministry of Home Affairs, but this prohibition did not apply *inter alia* to the use of a motor vehicle for the collection or delivery of merchandise by a person "where the merchandise consists of furniture collected or delivered by such person in connection with his business as a remover or storer of furniture."

The Transport Act (Northern Ireland), 1948, created the Ulster Transport Authority as a public authority and empowered it to carry on the activities of the Board. Section 18(1) of that Act replaced the prohibition contained in section 15(1) of the 1935 Act but the exemption of persons carrying on the business of furniture removers and storers was narrowed. By section 19(1)(d) only the use by a furniture remover of a motor vehicle to move furniture or effects which were not part of his stock in trade from or to premises occupied by him to or from other premises occupied by him or to or from a store was exempted.

The respondents in that appeal were furniture removers and they were prosecuted for carrying furniture bought in Belfast by a furniture dealer to premises in Coalisland in a motor vehicle without the consent of the Authority and approval of the Ministry of Commerce and they were convicted. They contended that the effect of section 18(1) of the 1948 Act read with section 19(1) was "directly or indirectly to take" their property without compensation and that to the extent that the Act did so, it was void as being contrary to the Government of Ireland Act 1920, section 5(1). Lord MacDermott L.C.J., with whose judgment Porter L.J. and Black L.J. agreed, said at page 112 that he was of the opinion that if the law was valid

"the respondent's property would be taken contrary to section 5(1). I think it would be taken over and not just taken away, and I think this would not only be the effect but would also be in accordance with the intention of the impugned legislation. Now if that is right — and I shall say why I think it is right in a moment — then, although the Parliament of Northern Ireland has said nothing in plain terms about the acquisition of any part of any furniture remover's business, section 5 would undoubtedly be contravened because it forbids the taking by indirect as well as by direct means and therefore strikes at any legislative device designed and sufficient to achieve acquisition without compensation though not purporting to do so.

A colourable device of this nature ought not to be ascribed readily to the Legislature, but when the nature of the relevant legislation and of its consequences . . . are considered I can see no escape from the conclusions I have mentioned. So far as the statute book is concerned one has first a general acquisition of road motor undertakings on payment of compensation. . . . But the undertakings of furniture removers and storers are excepted and the owners are left free to ply their trade. Then, with no further provision as to acquisition with compensation, these owners are forbidden to carry on a substantial part of their business. What is the reason for this change? . . . . Parliament must be presumed to intend the necessary effect of its enactments, and the answer to this question cannot overlook the fact that in this specialised field . . . the natural consequence of the enforcement of the relevant prohibition would be to divert to the appellants the business, or at least the substantial part of the business, which their erstwhile competitors were no longer allowed to transact. . . .

I think, therefore, that the legislation and the nature of its subject matter justify the answer that the intention was to enable the appellants to capture the prohibited business, and to do so without expense."

While their Lordships do not seek to question the correctness of the views expressed in this passage in relation to the facts of that case, it is apparent that Lord MacDermott's decision had regard to the legislative history and to the fact that the statutory prohibition was a colourable device to secure property without compensation which if the property had come within the scope of the Act of 1935 would have been payable.

Two other cases must now be referred to. In *Northern Ireland Road Transport Board* v. *Benson*[6] a Resident Magistrate dismissed a charge under section 15(1) of the Road and Railway Transport Act (Northern Ireland), 1935, on the ground that that section was *ultra vires*. There was an appeal to Quarter Sessions and from there to the Court of Appeal and then to the House of Lords where it was held ([1942] A.C. 520) that there was no right of appeal from the dismissal of the summons by the Resident Magistrate and so that the Court of Appeal and Quarter Sessions had had no jurisdiction. Nevertheless weight must be attached to the observations of the Lord Justices on the questions argued in that appeal. Andrews C.J thought there was

"a fundamental and well recognised distinction between taking or authorising property to be taken without paying compensation, this involving an actual use or taking of property into possession, and a negative or restrictive provision which merely involves interference with the owner's enjoyment of property" (p. 145).

He relied on the observations of Wright J., as he then was, in *France Fenwick & Co. Ltd.* v. *The King*[7] when he said that he would assume that the Crown had no right at common law to take a subject's property for reasons of State without paying compensation. He then said

"I think, however, that the rule can only apply (if it does apply) to a case where property is actually taken possession of, or used by, the Government, or where, by the order of a competent authority, it is placed at the disposal of the Government. A mere negative prohibition, though it involves interference with an owner's enjoyment of property, does not, I think, merely because it is obeyed, carry with it at common law any right to compensation. A subject cannot at common law claim compensation merely because he obeys a lawful order of the State."

Where it is clear, as it was in *Ulster Transport Authority* v. *James Brown & Sons Ltd., supra,* that the prohibition imposed by the Legislature is a colourable device to secure property without paying compensation, the prohibition may properly be held to be *ultra vires.* But, as Lord MacDermott said, a colourable device ought not to be ascribed readily to a Legislature.

In this case it was suggested in the lower courts that section 35A was a colourable device for acquiring the Association's property but no such suggestion was advanced on the hearing of this appeal.

Article 13(2) places a restriction on the powers of the Legislature. It is not within its power to pass a law providing for the compulsory acquisition or use of someone else's property without providing for the payment of compensation. Having reached the conclusion that there was no failure to comply with Article 13, it is not necessary to consider whether, if there had been, it would have been right to grant the declaration in the first prayer in the Statement of Claim. It is certainly open to doubt whether the Association would have any right of action against the Government of Malaysia for failure by the Legislature to observe the provisions of the Constitution.

If section 35A was *ultra vires* and of no effect, as the Association contended, there was nothing to stop it carrying on its pilotage activities.

For the reasons stated their Lordships will advise the Yang Dipertuan Agung that this appeal be allowed with costs.

Lord Salmon (dissenting judgment): The respondents are a firm whose business, until May 1, 1972, consisted of providing pilotage services in Port Swettenham for any vessels requiring such services. They enjoyed a monopoly in this business which had been started in 1946 and registered in 1954 under the Registration of Businesses Ordinance, 1953. There were six partners in the firm, all licensed pilots, and they employed other licensed pilots, office staff, launch crews and trainee pilots. They rented premises from the second named appellants, the Port Authority, and owned launches and other equipment for the purpose of carrying on their business. The pilotage dues earned in the business were all paid over to the respondents out of which they paid all the salaries of their employee licensed pilots and of the rest of the staff and all their other business expenses. The balance constituted the profits of the business. There is nothing to suggest that this was not a well run and thriving business earning a reasonable profit and providing efficient and adequate pilotage services to all vessels using Port Swettenham. In my view, the business including the goodwill attaching to it was clearly the property of the respondents and indeed this is not disputed by the appellants.

Section 2(1) of the Port Authorities Act, 1963, enacted that a Port Authority should be established in respect of every port specified in the First Schedule. The only port specified in the Schedule was Port Swettenham. The Act may well have been designed to apply to other ports but none other has so far been added to the Schedule. Section 3 of the Act provided that the Port Authority should be empowered to operate and maintain the port and imposed a duty on the Authority

"to maintain, or provide for the maintenance of, adequate and efficient port services and facilities . . . at reasonable charges for all users of the port, consistent with the best public interest;".

This Act did not specifically mention pilotage or stevedoring services. The pilotage services continued to be rendered by the respondents and the stevedoring services by four private stevedoring companies until 1972 when the stevedoring services in Port Swettenham were taken over by the Port Authority from the companies on payment of not less than $5,000,000 compensation, and the pilotage services were taken over by the Port Authority without compensation in circumstances to which I shall presently refer. It is right to point out that there was no evidence, one way or the other, as to whether the $5,000,000 paid to the stevedoring companies included compensation for goodwill and loss of future profits but there is no reason to assume that it did not: the respondents' claim was exclusively for compensation for loss of goodwill and future profits.

The Port Authorities Act, 1963, was amended by the Port Authorities (Amendment) Act, 1972. This amendment added new sections to the Act of 1963 which imposed on the Port Authority the duty of providing pilotage services within any area in the port and the approaches to the port which it declared by notification in the *Gazette* to be a pilotage district. On April 13, 1972, the Authority in exercise of its power conferred by section 29A(1) of the amended Act of 1963 declared Port Swettenham to be a pilotage district. Sections 29D and 29H (1)-(5) (inclusive) of the amended Act of 1963 enacted that the Authority with the approval of the Minister should appoint a Pilotage Committee to take over the duty of issuing pilots' licences formerly performed by the Pilot Board under the Merchant Shipping Ordinance of 1952. The examination and tests for obtaining a pilot's certificate and the circumstances in which such a certificate might be cancelled were the same under the Pilotage Committee's administration as they had been under the Pilot Board with this important exception:— the licence could be issued only for a pilot to be employed by

the Authority and ceased "to be valid upon the termination of any Authority pilot's employment with the Authority." Moreover every pilot who held a licence issued by the old Pilot Board to act as a pilot in the Port Swettenham pilotage district was deemed to be qualified for employment by the Authority as a pilot and the Pilotage Committee acting on behalf of the Authority was required to issue to such pilot when employed by the Authority a licence to act as an Authority pilot in the pilotage district subject to such conditions as the Pilotage Committee might impose.

Section 35A(1) and (2) of the amended Act of 1963 provided as follows:

"(1) Any person who, not being an Authority pilot, engages in any pilotage act or attempts to obtain employment as a pilot of a vessel entering or being within any pilotage district shall be guilty of an offence under this Act and shall be liable on conviction to a fine not exceeding one thousand dollars.

(2) Any master or owner of a ship entering or being within any pilotage district who knowingly employs as pilot any person who is not an Authority pilot shall be guilty of an offence under this Act and shall be liable on conviction to a fine not exceeding one thousand dollars."

Article 13 of the Constitution reads as follows:

"(1) No person shall be deprived of property save in accordance with law.

(2) No law shall provide for the compulsory acquisition or use of property without adequate compensation."

This appeal turns upon the true answer to the question whether the law enacted by the amendments to the Port Authorities Act, 1963, was in breach of Article 13(2) of the Constitution. This, to my mind, depends upon whether that law provided directly or indirectly for the compulsory acquisition by the Authority of the respondents' business which had been in existence since 1946 and included amongst its assets its goodwill and prospects making future profits.

"The principle that a legislature cannot do indirectly what it cannot do directly has always been recognised by their Lordships' Board and a legislature must, of course, be assumed to intend the necessary effect of its statutes." *Pillai* v. *Mudanayake*[8] per Lord Oaksey at p. 528 in delivering the judgment of the Board.

I entirely agree with my noble and learned friends that a pilot had no right of property in his licence and that the respondents' right to employ pilots was not a right of property. To deprive a pilot of his right to a licence or anyone of his right to employ a pilot does not, looked at in isolation, amount to depriving either of them of property; still less does it amount to an acquisition of property by the Authority. In my view, however, this, for reasons which I shall explain, is entirely irrelevant to the question raised by this appeal.

It must be obvious that Port Swettenham could not operate without a pilotage service. For very many years prior to May 1, 1972 the respondents' business alone had provided this service. There was nothing to prevent the Authority or anyone else from employing licensed pilots and going into competition with the respondents, but no one did so.

The legislative measures passed in 1972 obviously had the inevitable effect of putting the respondents out of business. Indeed it is conceded that this legislation deprived them of their property in their business. To deprive the respondents of their business was not however by itself a breach of Article 13(1) of the Constitution, which affords protection against any person being deprived of property "save in accordance with law": and the respondents were deprived of their property in accordance with law, namely section 29H and in particular section 35A of the Port Authorities Act, 1963, as amended by the Act of 1972. It is Article 13(2) of the Constitution which alone puts a restriction upon the Legislature by forbidding the enactment of any law which provides "for the compulsory acquisition or use of property without adequate compensation."

Although I agree with the decision of the Federal Court, I do not entirely accept the reasoning of all of the judgments upon which they relied. These were judgments of the Supreme Court of India relating to the construction Article 31(1) and (2) of the Indian Constitution which are very similar to Article 13(1) and (2) of the Malaysian Constitution. I prefer the reasoning of Das J. in *The State of West Bengal* v. *Bose & Ors.*[1] which is set out in the judgment of my noble and learned friends and leads to the conclusion that there could be circumstances in which a person may be deprived of his property otherwise than by its acquisition.

I am however entirely convinced that the amending Act of 1972 did provide indirectly but inevitably for the compulsory acquisition without compensation of the respondents' property by the Authority and therefore contravened Article 13(2) of the Constitution.

There was of course no question of closing Port Swettenham. It must therefore have been obvious that when the amending legislation of 1972 came into force all the shipping companies and charterers and the like who had formerly been customers of the respondents for pilotage services would have no choice other than to transfer their custom to the Authority. In other words, it was obvious that the respondents' business would be taken over by the Authority without compensation as a result of the Act of 1972 — as indeed it was. This is why I am convinced that there was a clear breach of Article 13(2) of the Malaysian Constitution.

On March 27, 1972 the respondents wrote a letter to the Port Authority which so far as material reads as follows:

"Tuan,

Take-over of Pilotage Service

"In compliance with instructions contained in recent communications, ... from the Ministry of Communications, ... this Association would like to inform you that all the material assets in the Association which have already been valued by your valuer are now ready for your take-over with your full payment April 1, 1972, the date fixed by the Government for the take-over of the pilotage service by your Authority from this Association. This is without prejudice to any claims by the Association for compensation otherwise than for the material assets referred to above. ..."

On March 31, 1972 the Director (Administration) for the Director General of the Port Authority wrote a letter in reply which so far as material reads as follows:

"Dear Sirs,

Take-over of Pilotage Service

In reply to your letter dated March 27, 1972 in regard to the taking over of pilotage assets, I am directed to advise you that this Authority has been directed by the Ministry of Communication to take over the Pilotage Services with effect from May 1, 1972. Therefore, in so far as the date for taking over of assets is concerned, this will be a few days before May 1, but in so far as the payment is concerned, this will be subject to further correspondence."

All but two or three of the pilots who had worked in the respondents' business prior to May 1, 1972 accepted the offer by the Authority to employ them as pilots from that date. Indeed they had no choice but to accept the offer if they wished to continue working as pilots in Port Swettenham without committing a crime under section 35A of the amended Act of 1963.

The respondents sold their pilot launches and equipment to the Port Authority. They too had little choice other than to do so. The launches and equipment were of no use to the respondents after the take-over but they were then of use to the Authority which was anxious to buy them. Obviously it was sensible to sell to the Authority who were on the spot rather than go to the trouble and expense of trying to find other buyers who might well require the launches and equipment for use in some faraway port.

Apparently April 30, 1972 was the last day upon which the respondents carried on their business. Their customers whose vessels entered the port on that day would have seen the respondents' business being carried on as usual. On the following day nothing would have appeared to have changed. The same launches with the same pilots would have been carrying out the same services for the respondents' erstwhile customers as they had always done. It would in my view be wholly unrealistic to say that the Authority had not acquired the respondents' business; and acquired it as a result of the amending Act of 1972. If a customer had asked the respondents whether they had any news they could no doubt have truly replied: "Yes, bad news. The Authority has today taken over our whole business. They are employing our pilots and using our launches. It is true that they are graciously going to pay us for the launches but they refuse to pay us any compensation for the loss of our goodwill and our prospect of making future profits which they have now acquired." If they were then asked how did this acquisition come about, the respondents could reply, in my view, truly: "Solely as the inevitable result of the recent legislation passed by the Government."

In my opinion, this appeal raises constitutional issues of vital importance. I fear that it will encourage and facilitate nationalisation without compensation throughout the Commonwealth. Suppose a part of the Commonwealth with a Constitution containing a clause in substance the same as Article 13(2), and a nationally owned airline competing perhaps not too successfully with a privately owned airline. A law is passed making it a criminal offence for a licensed pilot to accept employment as a pilot with any airline other than the nationally owned one. This would have the effect of putting the privately owned airline out of business and of automatically transferring the bulk of its customers to the national airline. I consider that the law I have postulated would be void under the Constitution unless it provided for the private airline to be compensated for that part of its business which the national airline acquired. In the present appeal it has been argued that section 35A introduced by the Act of 1972 does not involve an acquisition or taking of the respondents' business property in law but is only "a negative or restrictive provision which merely involves interference with the owner's enjoyment or property." If that argument succeeds, it would surely succeed in the case I have postulated and in many others of a similar kind. For example the Malaysian legislation might have made it a criminal offence for anyone to be employed or offered employment as a stevedore in Port Swettenham except by the Port Authority. It is unnecessary to multiply instances. There are many who believe passionately, and perhaps rightly, that nationalisation is necessarily in the public interest and leads to greater efficiency. That was the reason that was given in the present case for nationalising the respondents' business and would no doubt be given in cases of the kind I have mentioned. Even if this view is correct, I do not understand how it surmounts Article 13(2) of the Constitution.

The Federal Court relied upon the decision of the Northern Ireland Court of Appeal in *Ulster Transport Authority* v. *James Brown & Sons Ltd.*[5] Section 5(1) of the Government of Ireland Act 1920 prohibits the Parliament of Northern Ireland making a law so as either directly or indirectly to take any property without compensation. It clearly bears a close resemblance to Article 13(2) of the Constitution with which this appeal is concerned.

Section 18(1) of the Transport Act (Northern Ireland), 1948, prohibits the use by any person other than the Ulster Transport Authority of a motor vehicle on a public highway to carry for reward any passengers or luggage or merchandise except with the consent of the Authority and the approval of the Ministry of Commerce. Section 19(1) excepts from the restrictions imposed by section 18(1) the use by furniture removers of motor vehicles "to move furniture or effects, not being the part of the stock in trade of the owner thereof, from or to premises occupied by such owner . . . to or from a store." The modification by section 19(1) of the restrictions imposed on furniture removers by section 18(1) still left furniture removers prohibited from carrying on an important part of their business. The Court of Appeal held that the interest of furniture removers in continuing to carry on the prohibited part of their business, whether such interest was to be regarded as goodwill or as an interest distinct from goodwill, was property within the meaning of section 5(1) of the Act of 1925 and that the effect of section 18(1), as modified, was to contravene section 5(1) of the Act of 1920 in that it constituted taking property without compensation by transferring it to the Ulster Transport Authority. Lord MacDermott L.C.J. said at pages 112 and 113

"Parliament must be presumed to intend the necessary effect of its enactments, and . . . the natural consequence of the enforcement of the relevant prohibition would be to divert to [the Ulster Transport Authority] the business . . . which [James Brown & Sons Ltd.] were no longer allowed to transact. . . . it is hard to see where the bulk of the business could legitimately go if it did not pass to [the Ulster Transport Authority]."

In the present case it is impossible to see where the respondents' business could have gone other than to the Port Authority and, although just as in the Northern Ireland case, nothing was spelt out in the relevant Act about the acquisition of the respondents' business, it is quite obvious that the appellants intended that that is where that business should go as a result of the amending Act of 1972 — and that is where it went.

Lord MacDermott held that Parliament had resorted to a colourable legislative device to acquire the business without having to pay compensation to its owners and relied on this factor in coming to his decision. In the present case the appellants, who had relied on the same factor below, abandoned it perhaps unwisely before this Board. Lord MacDermott's criticism of the Government's conduct was certainly justified. I think however that perhaps he laid too much stress upon the nature of this conduct as a ground for his decision. It seems to me that the motives and behaviour of the Government were irrelevant. The object of section 5(1) of the Government of Ireland Act 1920 was to prohibit Parliament from making laws which would enable property to be taken without compensation. Such laws are generally recognised as being repugnant to justice. In my view, Parliament's motives for making such a law are irrelevant. If the effect of a law is to enable property to be acquired without compensation, whatever may be the Court's view of Parliament's behaviour in passing it, it would be invalid — in Ireland under section 5(1) of the 1920 Act and in Malaysia under Article 13(2) of the Constitution. The Malaysian Parliament must have been just as well aware of the inevitable effect of the legislation it passed in 1972 as the Parliament of Northern Ireland was aware of the effect of the legislation it passed in 1948.

The appellants relied upon the decision of Wright J. in *France Fenwick & Co. Ltd.* v. *The King*[7] which is also cited by my noble and learned friends as an authority for allowing the appeal. That case arose out of an incident occurring during a coal strike in 1921. By Regulations made under the Emergency Powers Act 1920 the Government was empowered to requisition ships and to take possession of stocks of coal. The Regulations further made provision for the assessment of "the compensation payable in respect of any property which is requisitioned or of which possession is taken under these Regulations."

The suppliant's vessel arrived in the Thames on April 2, 1921 with a cargo of coal. On that day a Customs Officer told the chief officer that "in no circumstances is the vessel to discharge without permission." The vessel accordingly lay with the coal on board until April 21 when the Government requisitioned the coal. On April 22 the vessel was ordered by a Government department to proceed to Erith and discharge there which she did, the discharge being completed on April 23. The suppliants contended that the vessel had been requisitioned and/or that possession had been taken of her by the Government and claimed compensation under the Regulations, alternatively at common law, from April 2 to April 23. Wright J. said that the vessel had been requisitioned only for two days, i.e. April 22 and 23. He made the assumption that the Crown had no right at common law to take a subject's property for reasons of State without paying compensation and added:

> "I think, however, that the rule can only apply (if it does apply) to a case where property is actually taken possession of, or used by, the Government .... A mere negative prohibition, though it involves interference with an owner's enjoyment of property, does not, I think, merely because it is obeyed, carry with it at common law any right to compensation. A subject cannot at common law claim compensation merely because he obeys a lawful order of the State. Hence, I think, there is no right at common law which the suppliants ... can claim in respect of the period up to April 22."

In my respectful view, it is obvious that neither the decision nor the observations of Wright J. taken in their context lend any support to the appellants' case and are indeed wholly irrelevant to any question arising on this appeal.

I would now revert to the judgment of Lord MacDermott in the *Ulster Transport Authority* case, *supra*.

At page 109 he said:

> " 'Goodwill' is a word sometimes used to indicate a ready formed connection of customers whose custom is of value because it is likely to continue. But in its commercial sense the word may connote much more than this.... When the make-up of a well-established, profitable enterprise ... is examined I think it well-nigh impossible to disentangle the business that has been built up from its goodwill or to give the latter a single or precise meaning. I therefore approach the question under consideration on the basis that here the relevant loss is really a loss of goodwill in the commercial sense as described by Lord Macnaghten in *Muller & Co.'s* case [1901] A.C. 217, 224."

And so do I, for the same reasons, in the present case. Goodwill is something which is bought and sold daily. It seems to me obvious that the respondents by their enjoyment during so many years of a monopoly in the provision of efficient pilotage services must have acquired a goodwill the value of which, as my noble and learned friends agree, would have been reflected on a sale by the respondents of their business. The Act of 1972 deprived the respondents of the right and the chance of selling their business because its inevitable effect was to cause the Authority to take over the business. Since, as Lord MacDermott pointed out, it is impossible to disentangle a business such as the respondents' from its goodwill, when the Authority acquired the business, they acquired its goodwill with it. The fact that by reason of the provisions of the Act, the Authority could not sell the goodwill is beside the point. They had deprived the respondents of the right of selling a valuable asset, namely the goodwill, by acquiring their business and goodwill, and therefore they were liable to compensate the respondents for the loss of a right which was of value to the respondents notwithstanding that it may not have been a right which was of any value to the Authority. Compulsorily to acquire an asset from a person to whom it was of value does not excuse the acquirer from compensating that person for the loss of that asset even if it is of no value to the acquirer.

It has been argued on behalf of the appellants that the amending Act was merely regulatory: that it only regulated the provision of the pilotage services in Port Swettenham but did not confiscate the respondents' business which had since 1946 consisted of the provision of these services. Even if the Act could

properly be described as merely regulatory — which in my view it cannot — I would adopt and rely upon the language of Holmes J. in (1922) 260 U.S. at page 417 cited by Viscount Simonds in *Belfast Corporation* v. *O.D. Cars Ltd.*[9] at 519:

"The general rule at least is, that, while property may be regulated to a certain extent, if regulation goes too far it will be recognised as a taking."

The Act of 1972 went so far and must have been recognised by the Legislature as going so far as making it inevitable that the Authority would take the respondents' business immediately the Act came into force. If, contrary to my view, the amending Act can properly be characterised as merely regulatory and it does not go far enough to be recognised as a taking, it is impossible to imagine any regulation that could be so recognised.

I entirely agree with my noble and learned friends that the right to employ pilots was not acquired from the respondents by the Authority. Before the amending Act, the Authority like anyone else was entitled to employ pilots and compete with the respondents. After the amending Act the appellants were given the exclusive right to employ pilots. The vice in the amending Act was that it made it a criminal offence for pilots to be employed by the respondents or anyone else except the Authority and thereby made it inevitable, for the reasons I have already set out, that the respondents' business should be taken over by the Authority.

The Federal Court having found in favour of the present respondents ordered that the case be remitted to the trial court so that the question of damages payable to the present respondents by the present appellants should be ascertained. I hardly thing that it can seriously be meant that if section 35A was *ultra vires*, "there was nothing to stop [the respondents] carrying on their pilotage activities" and that the respondents would still not be able to obtain any damages or compensation although the Authority *de facto* acquired their business four years ago. Indeed I understood Counsel for the appellants very fairly to concede on behalf of his clients that they did not wish the Order of the Federal Court to be disturbed if this Board came to the conclusion that the appellants had by virtue of the amending Act of 1972 been in breach of Article 13(2) of the Constitution.

For these reasons I would have advised the Yang Dipertuan Agung to dismiss this appeal with costs and to remit this case to the trial court in accordance with the Order made by the Federal Court.

Appeal allowed.

Solicitors: *Stevenson, Harwood & Tatham; Buleraig & Davis.*

SINGAPORE REPORTS

THE "PANGKALAN SUSU/PERMINA 3001" RASU MARITIMA S.A. v. "PANGKALAN SUSU/PERMINA 3001" (OWNERS) & PERSONS INTERESTED

[O.C.J. (Rajah J.) January 12, 1977]
[Singapore — Admiralty in Rem No. 340 of 1976]

Shipping — Admiralty suit in rem — Claim against defendants for non-payment of charter hire — Whether defendants are "beneficial owners" and liable — Meaning of "beneficial owners" — R.S.C. 1970, O. 70 r. 4(7) — High Court (Admiralty Jurisdiction) Act (Cap. 6), s. 4(4).

On May 9, 1974 a purchase contract for the construction and purchase of a tanker was entered into between Greenock, a corporation registered under the laws of the Republic of Liberia, the seller and Pertamina, the buyer (defendants). The vessel was to be delivered on or before March 31, 1976. The first payment was to be made on delivery date and the balance of the payments was to be made in 71 consecutive instalments and upon full payment the title to the vessel was to be transferred to the defendants without any further payments. On November 1, 1975, Greenock assigned all of its rights under the said purchase contract to Ozark and on March 29, 1976 the vessel was duly delivered under the contract to the defendants. Since then the defendants had been in possession and control of the vessel. However, she was registered in the Republic of Panama on July 1976 in the name of Ozark carrying the name of "Pangkalan Susu/Permina 3001".

On September 20, 1976, the plaintiffs commenced an Admiralty *in Rem* action against the defendants for the sum of US$3,929,090.24 for non-payment of instalments of charter hire due for the months of February to August 1976 and bunkers under the charter-party in respect of the vessel "Bruce Ruthi II". The said vessel "Permina 3001" was accordingly arrested on September 23, 1976.

The plaintiffs contended that even though Ozark was the registered owner of the vessel the said vessel nevertheless, for purposes of section 4(4) of the High Court (Admiralty Jurisdiction) Act was "beneficially owned as respects all the shares therein" by the defendants for she was in the possession and control of the defendants. The defendants on the other hand argued, *inter alia*, that the ordinary use of the words "beneficial owner" meant a person with a proprietary interest in the vessel either legal or equitable which the defendants were not. They further contended that words "as respects all the shares therein" suggested that a proprietorial interest was meant since shares in a ship were the means by which a ship was owned, title passing with the shares.

The issue before the court was whether the vessel being in possession and control of the defendants by virtue of a contract to purchase it by instalments, such instalments not having been fully paid, could be said to be beneficially owned as respects all the shares therein by the defendants.

Held, setting aside the writ: (1) the words "beneficial ownership as regards all the shares therein" must be given their full and accepted meaning in our laws when the Singapore Act was put on the statute book in 1962, and must not be construed in the light of the Brussels Convention as Singapore is neither a signatory to nor has it acceded to the International Convention Relating to the Arrest of Seagoing Ships 1952;

(2) the vessel was, at the date when the action was brought, not "beneficially owned as respects all the shares therein" (the legal and equitable owner being Ozark) by the defendants within the meaning of section 4(4) of the High Court (Admiralty Jurisdiction) Act (Cap. 6);

(3) as all the requirements of section 4(4) of the said Act had not been fulfilled the court had no jurisdiction to entertain proceedings *in rem* against the vessel in respect of the claim.

Cases referred to:-

(1) *St. Merriel* [1963] P. 247, 258.

(2) *Andrea Ursula* [1973] 1 Q.B. 265.